No. 09-728

IN THE

Supreme Court of the United States

JOHN A JENSEN, *et ux* ,

Petitioners,

v

PAUL A STOOT, SR , *et al* ,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC., IN SUPPORT OF PETITIONERS

WILLIAM J JOHNSON
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC
317 South Patrick Street
Alexandria, VA 22314
(703) 549-0775

DEVALLIS RUTLEDGE*
LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
210 West Temple Street
18-101
Los Angeles, CA 90012
(213) 974-6765

**Counsel of Record for Amicus Curiae*

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Amicus curiae National Association of Police Organizations, Inc , respectfully moves for leave of Court to file the accompanying brief under Supreme Court Rule 37 2 Counsel for petitioner has consented to the filing of this brief and written consent has been filed with the Clerk of the Court, counsel for respondent has not consented

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action and education

Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States NAPO represents more than 2,000 police units and associations, 241,000 sworn law enforcement officers, 1,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement

In this case, the Court of Appeals held that officers are subject to civil liability for a Fifth Amendment violation if their interrogation of a criminal suspect is ruled coercive and if—but only if—a prosecutor or judicial officer subsequently relies in part on the statement in making decisions in the courthouse This erroneous ruling adversely affects the interests of our members by wrongly subjecting officers to damages on the basis of the unpredictable actions of third parties

The ruling creates a disincentive for officers to attempt suspect interrogations, thereby depriving the truth-finding process of the benefit of both inculpatory and exculpatory statements that might have been obtained

For these reasons, *amicus curiae* respectfully requests that the Court grant leave to file this brief

Respectfully submitted,

WILLIAM J JOHNSON
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC
317 South Patrick Street
Alexandria, VA 22314
(703) 549-0775

DEVALLIS RUTLEDGE*
LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
210 West Temple Street
18-101
Los Angeles, CA 90012
(213) 974-6765

**Counsel of Record for Amicus Curiae*

January, 2010

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS*

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action and education

Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States NAPO represents more than 2,000 police units and associations, 241,000 sworn law enforcement officers, 1,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement

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* No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief No person other that *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief

SUMMARY OF ARGUMENT

A SPLIT OF AUTHORITY AMONG SIX CIRCUITS OF THE COURT OF APPEALS SHOULD BE RESOLVED BY THIS COURT'S HOLDING THAT CIVIL LIABILITY CLAIMS ALLEGING UNCONSTITUTIONAL POLICE INTERROGATION MUST BE ANALYZED UNDER THE FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS STANDARD, AND NOT UNDER FIFTH AMENDMENT PRINCIPLES RELATING TO THE EVIDENTIARY ADMISSIBILITY AT TRIAL OF SELF-INCRIMINATING STATEMENTS

ARGUMENT

I. THIS ISSUE IS RIPE FOR REVIEW BY THIS COURT.

In *Stoot v City of Everett, Washington,* 582 F 3d 910, (9th Cir 2009), the Court of Appeals for the Ninth Circuit held that an interrogating police officer violates the suspect's Fifth Amendment right against compelled self-incrimination *if* the prosecutor relies on a coerced statement when filing charges, or *if* a magistrate relies on it during pretrial proceedings

The Court should grant the petition for certiorari under Rule 10 1(a) and (c). The decision of the Ninth Circuit is in accord with the decisions of two other circuits and in conflict with the decisions of three more, on an important question of federal law that has not been, but should be, settled by this Court

Like the Ninth Circuit, both the Second and Seventh Circuits have wrongly concluded that police officers violate a suspect's Fifth Amendment privilege against compelled self-incrimination *if* court personnel rely on coerced statements *Higazy v Templeton,* 505 F 3d 161 (2d Circuit 2007), *Sornberger v City of Knoxville,* 434 F 3d 1006 (7th Cir 2006)

In contrast, the Third, Fourth and Fifth Circuits correctly hold that the Fifth Amendment protects a fundamental *trial* right, which police do not violate in the interrogation room *Renda v King,* 347 F 3d 550 (3d Cir 2003), *Burrell v Virginia,* 395 F 3d 508 (4th Cir 2005), *Murray v Earle,* 405 F 3d 278 (5th Cir 2005)

Since the "percolation" of this issue of federal law in the Court of Appeals has resulted in a 3-3 split of opinions, this Court's resolution of the conflict is timely and needed

II. POLICE DO NOT VIOLATE THE FIFTH AMENDMENT DURING SUSPECT INTERROGATIONS

A In *Chavez v Martinez,* 538 U S 760 (2003), this Court overruled a trio of Ninth Circuit decisions that had found law enforcement officers potentially liable in damages under 42 U S C § 1983 for Fifth Amendment violations, based on claims of interrogations that did not meet the evidentiary prerequisites prescribed in *Miranda v Arizona,* 384 U S 436 (1966) In so doing, the Court sought to distinguish between constitutional rights that may be abridged by police conduct (such as the Fourth Amendment), and those rights that protect

the integrity of the criminal trial (such as the Fifth Amendment) The Court noted that as to the Fifth Amendment privilege against compelled self-incrimination, *"a constitutional violation occurs only at trial "* *Chavez,* 538 U S , at 767, quoting *United States v Verdugo-Urquidez,* 494 U S 259, 264 (1990) (emphases added in *Chavez*)

The Court has regularly reaffirmed this precise characterization of the Fifth Amendment privilege *Withrow v Williams,* 507 U S 680, 691 (1993) (referring to a defendant's Fifth Amendment privilege against compelled self-incrimination as a "fundamental *trial* right") (emphasis supplied in *Withrow*), *United States v Balsys,* 524 U S 666, 692 (1998) (contrasting the scope of protection provided by the Fourth and Fifth Amendments, and noting that breaches of the Fourth Amendment "are complete at the moment of illicit intrusion, whatever use may or may not later be made of their fruits," whereas "The Fifth Amendment tradition, however, offers no such degree of protection," citing *Verdugo-Urquidez*), *Dickerson v United States,* 530 U S 428, 440 (2000) (repeating that the Fifth Amendment provides "a fundamental trial right," quoting *Withrow*)

The Court pointed out in *Chavez* that § 1983 liability may lie against an interrogating officer under Fourteenth Amendment substantive due process principles if the interrogation uses techniques that "shock the conscience." The Court of Appeals necessarily found in this case that the due process test was not met by the allegations of promises made

against Officer Jensen, however, the Court of Appeals made the Due Process test essentially irrelevant by adopting the view that *any* level of coercion sufficient to render a statement inadmissible at trial would support a § 1983 claim for violation of the Fifth Amendment privilege—provided a prosecutor or judicial officer subsequently relied on the statement in making any pretrial determinations

The Ninth Circuit ruling is an attempted "end-run" around the requirement of egregious conduct to state a claim of unconstitutional interrogation If a plaintiff's allegations of coercive interrogation fail to state a Fourteenth Amendment cause of action because they fall short of the shocks-the-conscience standard, she need only switch to a claimed Fifth Amendment violation and hold the officer liable in damages on a much lower standard of alleged coercion This ruling "finds no support in the text of the Fifth Amendment and is irreconcilable with [Supreme Court] case law " *Chavez,* 538 U S , at 773

Wrongful admission of a coerced statement is a "trial error, similar to the erroneous admission of other types of evidence " *Arizona v Fulminante,* 499 U S 279, 310 (1991) Police officers do not preside over trials They do not make rulings on the admissibility of statements They therefore cannot possibly violate any trial right, including the Fifth Amendment trial right against compelled self-incrimination

B The Court of Appeals held that the suspect's "rights under the Fifth Amendment were not violated until the allegedly coerced statements were used

against him in an affidavit filed by the prosecutor and at arraignment " *Stoot,* 582 F 3d, at 925 This ruling means that the Court of Appeals agrees that the police officer did not violate the Fifth Amendment in the manner of taking the statement It also means that if the prosecutor and the magistrate had relied only on other evidence (such as the victim's allegations) and had disregarded the suspect's statements, no Fifth Amendment violation would have occurred

In effect, the Ninth Circuit has ruled that a police violation of the Fifth Amendment depends on the subsequent actions of prosecutors, magistrates and judges (perhaps juries) This cannot be An officer's conduct either violates the Constitution when the action is taken, or it does not A police officer's violation of the Constitution "is complete when the wrongful action is taken " *Zinermon v Burch,* 494 U S 113, 125 (1990) Conduct that does not itself violate the Constitution does not become retroactively unconstitutional only in the event that courthouse officials engage in discretionary conduct in a particular way

Under the rule of the Second, Seventh and Ninth Circuits, the interrogation allegedly conducted by Officer Jensen retroactively violates the Fifth Amendment *if* the prosecutor or magistrate makes deliberative use of it, but the identical interrogation does *not* violate the Fifth Amendment if no subsequent third-party reliance occurs The actions of prosecutors and magistrates—not the conduct of the police officer—determines whether or not the officer has

violated the Constitution Once again, the Ninth Circuit employs "dubious logic " *United States v Knights*, 534 U S 112, 117 (2001)

Police officers cannot always reliably predict that a suspect's statement will ultimately (and correctly) be ruled coerced A state trial court ruling to the effect that a statement was not coerced may later be reversed by an intermediate appellate court, which in turn is reversed by a state supreme court, which in turn is reversed in federal habeas proceedings, eventuating in a subsequent reversal in this Court There is no way that an interrogating police officer can anticipate what the final ruling may be Nor should the officer's exposure to civil damages be conditioned on the status of the ruling when appeals happen to stop at any point along the appellate continuum Civil liability under § 1983 should be based on predictable principles of constitutional jurisprudence—not on a game of appellate "musical chairs "

C The Court of Appeals also said that "A coerced statement has been 'used' in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status " *Stoot*, 582 F 3d, at 925 How exactly would a reviewing court make the determinations that such reliance had occurred? Shall the prosecutor testify to his thought process when making the charging decision, speculating on the degree to which he relied on the suspect's statement to the exclusion of other evidence of guilt? Shall the magistrate testify as to her subjective reliance

on a statement in deciding matters of probable cause, bail and detention? Whenever a civil claim is made pursuant to *Stoot,* must the district court conduct a trial-within-a-trial in order to assess the existence and degree of prosecutorial and judicial reliance on a statement contained in an investigative report? Or shall the reviewing court simply guess? The unworkable process implied by the *Stoot* ruling is sufficient reason to grant *certiorari* and reverse this decision.

As Justice Souter said in his *Chavez* concurrence, a Fifth Amendment claim for damages against an interrogating officer has the obvious drawback of inviting "global application in every instance of interrogation producing a statement inadmissible under the Fifth and Fourteenth Amendment principles " *Chavez,* 538 U S , at 778 (Souter, J , concurring, joined by Breyer, J) The Ninth Circuit's decision in this case nevertheless approves just such global application, creating a § 1983 cause of action under the Fifth Amendment for every instance in which an officer is alleged to have used an exhortation that could be construed to be a sufficient threat or promise to make a resulting statement coerced and inadmissible, *if* the statement is contained in reports submitted to and relied on by the prosecutor or the court

This court has clearly stated that § 1983 claims alleging unconstitutional interrogation by state officers must be analyzed under the substantive due process clause of the Fourteenth Amendment *Chavez,* 538 U S , at 773, *Dickerson,* 530 U S , at 442 Under this precedent, it was clear error for the Court of Appeals to

deny Officer Jensen qualified immunity on the Stoots' Fifth Amendment claim for damages

CONCLUSION

The petition for writ of certiorari should be granted and the judgment of the Court of Appeals should be reversed

Respectfully submitted,

WILLIAM J JOHNSON
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC
317 South Patrick Street
Alexandria, VA 22314
(703) 549-0775

DEVALLIS RUTLEDGE*
LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
210 West Temple Street
18-101
Los Angeles, CA 90012
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**Counsel of Record for Amicus Curiae*

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